No. 439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

RADIANT BURNERS, INC., an Illinois Corporation,
Petitioner,

vs.

AMERICAN GAS ASSOCIATION; PEOPLES GAS LIGHT AND COKE COMPANY; NORTHERN ILLINOIS GAS COMPANY; et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION

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Respondents in their brief in opposition to the petition for certiorari have urged the existence of a uniformity of application of the attorney-client privilege to corporate communications. Only a few short months ago, some of the respondents more accurately represented to this Court that "There is very little law on the scope of the attorney client privilege as applied to corporations." *Petition for a Writ of Certiorari, General Electric Company and Sawyer* v. *Honorable William H. Kirkpatrick*, No. 831, October Term, 1962, page 10.

The fact of the matter is that there is no uniformity of application of the rule of privilege to corporations. All that the Seventh Circuit held was:

> "In balancing the competing goals of the free and unobstructed search for the truth with the right and absolute necessity for confidential disclosure of in-

formation by the client to its attorney to gain the legal advice sought thereby, the courts will realize that they are not dealing with a blanket privilege. The limitation surrounding any information must be determined for each document separately considered on a case-by-case basis." (App. 19a.)

Is the privilege then one to be applied at the discretion of the trial court?

Nor do the recent authorities cited by respondents suggest the unanimity for which they contend. Thus, Chief Judge Caleb M. Wright, in *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88, n. 12 (D. Del. 1962), stated:

> "To the extent that the learned Judge [Campbell] recognizes that application of the immunity to the corporation is problematical, I concur. This Court does not feel a corporation should be able to insulate vital facts by using the privilege in a perverting manner. However, in my opinion, the proper approach lies in tailoring the ordinary rules to the peculiar cloth of this legal entity. *Cf. Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (D.C. 1962)."

It was the decision in the *Westinghouse* case that some of the respondents here sought to overrule by a petition for mandamus from this Court on the ground that it departed from the "uniform rule." See Petition for Writ of Certiorari in No. 831, October Term, 1962, *supra*, pages 8-11, where the petitioners urged that Judge Kirkpatrick's ruling in the *Westinghouse* case "Emasculates the Attorney-Client Privilege as Applied to Corporations" and that the trial judge was guilty of three basic errors including that

> "he lost sight of the difference between an individual consulting his lawyer and a corporation consulting its lawyer or lawyers. In the former situa-

> tion, the individual is both the source of facts and the recipient of advice. In the latter, the sources of fact are almost invariably separated from that level of the corporate hierarchy which reaches a decision on the advice of counsel."

Petitioners in the *Westinghouse* case found that the lower court had defined the privilege so narrowly "as to be virtually meaningless." Judge Kirkpatrick in that case specifically rejected the rule as applied in other districts. After discussing the relevant cases, he said:

> "I do not think that any of these tests is satisfactory and I think there is a better approach." (210 F. Supp. at 485.)

He limited the application of the rule to those communications that are made by officials competent to decide what action should be taken on the advice of counsel. Judge Crary was in agreement in *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963). But that is not the rule suggested by the Seventh Circuit below; nor is it the rule applied by Judge Wyzanski in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). And it is different still from that applied by Judge Wright. In *United States* v. *Becton Dickinson & Co.*, 212 F. Supp. 92 (D. N.J. 1962), on which respondents also rely, the court said:

> "The parties before me concede that there is seeming conflict among the text writers and members of the judiciary, both English and American, respecting the reasons and justification for the acceptance or rejection of the doctrine of attorney-client privilege when asserted by or in behalf of a corporate litigant." (*Id.* at 93-94.)

It went on to apply the New Jersey rule, not a federal rule.

The conflicts in the courts over the issue can be multiplied further simply by reading the cases cited by respondents. But this is not the appropriate place for the examination of these authorities. Nor is it appropriate here, we believe, to debate the merits of the question in the fashion of respondents. Suffice it to say that in the absence of a definitive rule by this Court, the lower federal courts will continue their conflicting and contradictory practices in applying the rule of privilege, for the very obvious reason that the rule, as classicly stated, cannot be applied to corporate communications except by distorting the requirements of confidentiality and rejecting the fundamental rationale on which the privilege is said to be based. We are prepared to demonstrate that to the Court when the merits of the issue are presented for its consideration. This Court has never considered the question. It is clearly time that it did.

Respectfully submitted,

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